Supreme Court, U.S.
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No. 99-1612

IN THE

Supreme Court of the United States

JOHN W. RAGSDALE, JR., as trustee of the bankruptcy estate of NED MILLER,

Petitioner,

v.

RUBBERMAID, INC., AND RUBBERMAID COMMERCIAL PRODUCTS, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Edward Katze
COUNSEL OF RECORD FOR RESPONDENTS
Georgia Bar No. 409075
Constangy, Brooks & Smith, L.L.C.
230 Peachtree Street, N. W.
Suite 2400
Atlanta, Georgia 30303-1557
(404) 525-8622

St. Louis Law Printing, Inc. 14239 Manchester Rd. Manchester, MO 63011 314-231-4477

QUESTION PRESENTED

Does the doctrine of claim preclusion bar a retaliation action under 31 U.S.C. § 3730(h) which could have been, but was not, brought at the same time as a false claim action under 31 U.S.C. § 3730(b)?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	3
ARGUMENT	4
CONCLUSION	8

TABLE OF AUTHORITIES

CASES	Page
Jang v. United Techologies Corp., 206 F.3d 1147 (11th Cir. 2000)	4
Ragsdale v. Rubbermaid, Inc., 193 F.3d 1235 (11th Cir. 1999)	5,7
Clark v. Haas Group, Inc., 953 F.2d 1235 (10th Cir. 1992), cert. denied, 506 U.S. 832 (1992)	5
Israel Discount Bank LTD v. Entin, 951 F.2d 311 (11th Cir. 1992)	5
Citibank, N.A. v. Data Lease Financial Corp., 904 F.2d 1498 (11th Cir. 1990)	4,5,6
United States ex rel. Paul v. Parsons, Brinkerhoff, Quade & Douglas, Inc., 860 F. Supp. 370 (S.D. Tex. 1994), aff'd without op., 53 F.3d 1282 (5th Cir. 1995), cert. denied, 516 U.S. 1094 (1996)	6
Grand v. Northrop Corp., 811 F. Supp. 333 (S.D. Ohio 1992)	6
STATUTES	
31 U.S.C. § 3729	iii,2
31 U.S.C. § 3730(b)	i,iii
31 U.S.C. § 3730(h)	i,iii,2,5
RULES	
Sup. Ct. R. 10	7

STATEMENT OF THE CASE

Ned Miller (hereinafter "Miller")[1] began working for Respondent Rubbermaid Commercial Products, Inc. (for clarity, Respondents are referred to hereinafter collectively as "Rubbermaid"), in May 1998 as a National Accounts Manager, selling Rubbermaid products to supermarket chains, convenience store chains, health care chains, gas stations and other national users. Miller later became more involved with sales of Rubbermaid products to the government and less involved with national accounts. In early 1990, during the course of performing his duties in government sales, Miller became concerned about Rubbermaid's pricing practices and relayed those concerns to Rubbermaid's Vice President of Sales. Miller also sent a memorandum to his supervisor stating that certain pricing practices were in violation of Rubbermaid's agreements with the federal government.

In June 1991, Miller began reporting to a new supervisor, and in late February 1992, Miller reported his concerns about Rubbermaid's pricing practices to his new supervisor. As a result of this conversation, Miller's supervisor allowed him to attend a seminar entitled "Key Issues in Government Procurement" in Washington, D.C.

This seminar apparently sparked some further concern in Miller about Rubbermaid's pricing practices. Miller testified during his deposition that between March 6, 1992, and March 19, 1992, he worried about his

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[1]Although John W. Ragsdale, Jr., as trustee for Ned Miller's bankruptcy estate, took over Miller's case against Defendants and is the petitioner in this case, this brief refers to Miller as the petitioner.

criminal and civil liability for Rubbermaid's alleged unlawful pricing practices, as well as the potential criminal and civil liability of Rubbermaid. Because of those concerns, Miller contacted two attorneys between March 6 and March 19, 1992. Significantly, Miller told no one at Rubbermaid that he was going to, or did in fact, contact these attorneys.

Miller's termination occurred as a result of a corporate restructuring of certain Rubbermaid business units in an effort to improve Rubbermaid's reduced earnings and flat and/or reduced top line growth. Rubbermaid eliminated Miller's position to reduce the costs and expenses associated with positions that involved duties duplicated by other positions. Upon his termination, Rubbermaid gave Miller severance pay and other consideration, and Miller executed a waiver of "any and all claims" he may have had against Rubbermaid.

Despite waiving any and all claims against Rubbermaid, Miller filed a *qui tam* action under the False Claims Act, 31 U.S.C. § 3729, *et seq.*, against Rubbermaid on January 5, 1993. Although Miller's employment with Rubbermaid had been terminated approximately ten months before he filed that lawsuit, Miller did not assert retaliatory termination under 31 U.S.C. § 3730(h) as a claim in his *qui tam* action. The case was taken over by the Department of Justice and ultimately settled. As a result of the settlement, Miller entered into a Stipulated Dismissal With Prejudice and received $185,000.00.

Although Miller believes that he was fired because Rubbermaid assumed that he was going to file a *qui tam* action against Rubbermaid, Miller never mentioned to his supervisor or any other member of management the

phrase "*qui tam* action." Miller testified during his deposition that prior to his termination on March 20 (between March 6 and March 19), he had not even thought about initiating an action against the company regarding the alleged unlawful pricing practices. Miller testified that he did not start to consider a *qui tam* action against Rubbermaid until approximately six (6) to ten (10) weeks after his termination.

Nevertheless, and despite his waiver of any and all claims against Rubbermaid, Miller filed the instant retaliation action on February 27, 1996. The district court granted summary judgment to Rubbermaid, holding that Miller's retaliation claim could have been brought with his original *qui tam* action and was thus barred by claim preclusion. As a result of this holding, the district court did not reach the issue of whether Miller's claims were barred by settlement and release, or whether the evidence, viewed in a light most favorable to Miller, could support a jury verdict that Rubbermaid terminated his employment because he engaged in protected activity. The Eleventh Circuit Court of Appeals affirmed the district court on the basis of claim preclusion.

REASONS FOR DENYING THE WRIT

There are no compelling reasons for this Court to review the decision of the Court of Appeals on writ of certiorari, and multiple reasons for denying the petition for review:

- Miller cites no departure in this case from the accepted and usual course of judicial proceeding so as to call for an exercise of this Court's supervisory power;

- Miller cites no decision of a federal question by a United States court of appeals that conflicts with any decision of any other United States court of appeals;
- Miller cites no important question of federal law that has not been decided and should be settled by this Court, or that has been decided in a way that conflicts with relevant decisions of this Court;
- The Court of Appeals applied the correct legal standard to the facts of the case, and Miller's objection to the Court of Appeals's decision is based on his opinion that the Court misapplied a correctly stated rule of law.

ARGUMENT

Notwithstanding Miller's arguments to the contrary, this case does not involve any unique or novel question of law. Rather, it involves the straightforward application of the well-settled principles of claim preclusion to undisputed facts.

As the Court of Appeals correctly held, Miller's retaliation claim is barred under the doctrine of claim preclusion (formerly known as "res judicata"). In the Eleventh Circuit, claim preclusion bars a subsequent lawsuit when four elements are present: (1) a final judgment on the merits; (2) a decision rendered by a court of competent jurisdiction; (3) identical parties or privies in both suits; and (4) the same cause of action in both suits. *Jang v. United Techologies Corp.*, 206 F.3d 1147, 1149 (11th Cir. 2000); *Citibank, N.A. v. Data Lease Financial Corp.*, 904 F.2d 1498, 1501 (11th Cir. 1990).

In this case, it is not disputed that the first three elements of claim preclusion are met. Miller previously entered into a stipulation of dismissal with prejudice of the False Claims Act lawsuit against Defendants. In addition, the court had proper jurisdiction over the prior False Claims Act claim, and the parties in both lawsuits are virtually the same. Thus, the critical component in determining whether Miller's instant retaliatory discharge claim is barred by claim preclusion (and the only one with which Miller takes issue in his petition) is whether "the same cause of action" is involved in both cases.

The Eleventh Circuit followed the "transactional approach" to determine whether Miller's prior False Claims Act lawsuit and the instant retaliatory discharge lawsuit brought under the False Claims Act constitute the same "cause of action." *Ragsdale v. Rubbermaid, Inc.*, 193 F.3d 1235, 1239 (11th Cir. 1999) (*citing Citibank*, 904 F.2d at 1503). That is, "if a case arises out of the same nucleus of operative fact, or is based upon the same factual predicate, as a former action, . . . the two cases are really the same 'claim' or 'cause of action' for purposes of res judicata." *Citibank*, 904 F.2d at 1503; *see also Israel Discount Bank LTD v. Entin*, 951 F.2d 311, 315 (11th Cir. 1992); *Clark v. Haas Group, Inc.*, 953 F.2d 1235, 1238 (10th Cir. 1992), *cert. denied*, 506 U.S. 832 (1992). The underlying purpose behind this policy is to prevent a party "from relitigating issues that were or could have been raised" in a prior lawsuit. *Clark*, 953 F.2d at 1238.

As the Court of Appeals correctly concluded, Miller's instant claim under § 3730(h) is based on "the same cause of action" as the earlier False Claims Act lawsuit because the instant case arises out of the same nucleus

of operative facts, or is based upon the same factual predicate, as the earlier False Claims Act action, such that the two cases constitute the same "cause of action" for purposes of claim preclusion. *See Citibank*, 904 F.2d at 1503. Both claims rest on the statutory provisions of the False Claims Act; both claims relate to Miller's former employment with Rubbermaid; both claims involve the same parties and witnesses; and both claims would have made a convenient trial unit. *United States ex rel. Paul v. Parsons, Brinkerhoff, Quade & Douglas, Inc.*, 860 F. Supp. 370, 374-75 (S.D. Tex. 1994), *aff'd without op.*, 53 F.3d 1282 (5th Cir. 1995), *cert. denied*, 516 U.S. 1094 (1996) (pricing violations claim under False Claims Act which could have been, but was not, brought as part of earlier retaliatory discharge claim under False Claims Act was barred by claim preclusion); *cf. Grand v. Northrop Corp.*, 811 F. Supp. 333, 336 (S.D. Ohio 1992) ("we note that a relator's *qui tam* claim is often interrelated to his claim for retaliation"). Moreover, as the Court of Appeals held, Miller's cause of action for retaliatory discharge, of which he was clearly was aware, had already accrued at the time he filed his earlier False Claims Act claim, and he could have and should have asserted the retaliation claim as part of his earlier claim so that all his claims arising out of the same facts and involving the same parties could have been litigated in one forum instead of in this piecemeal fashion. Finally, the Court of Appeals noted that Miller received a bounty of $185,000 as a result of his *qui tam* claim and correctly concluded that "to allow him to proceed with [the instant case] would permit future *qui tam* plaintiffs strategically to sever their claims in the hope of obtaining a second bite at the apple, should their first action prove unsuccessful. **This is textbook**

[claim preclusion] ." *Ragsdale*, 193 F.3d at 1240 (11th Cir. 1999) (emphasis added). In other words, it is clear that the Court of Appeals applied the well-settled principles of claim preclusion to the undisputed facts of this case and correctly concluded that Miller's subsequent retaliation action was barred.

Miller bases his petition for review on nothing more than his unsupported opinion that the case at bar was wrongly decided by the Court of Appeals. Indeed, Miller simply disagrees with the Court of Appeals's application of the well-settled principles of claim preclusion and instead argues that his retaliation claim should not be barred because the government, as intervenor, would not have vigorously prosecuted his retaliation claim had it been brought as part of his original *qui tam* claim. However, it is well-settled that this Court generally will not grant a petition when the asserted error consists of what the petitioner perceives as erroneous factual findings or the misapplication of a properly stated rule of law. SUP. CT. R. 10.

Additionally, although this clearly is not a reason for granting Miller's petition, it is worth noting that Miller's rationale lacks merit. Miller cites to no evidence to support his opinion that the government does not or would not vigorously prosecute a relator's retaliation claim. The only support Miller offers is his unsubstantiated surmise that this would happen. Miller also overlooks the fact that if the government simply abandoned relators' claims upon taking over *qui tam* actions, there would be less incentive for relators to bring *qui tam* actions in the first place. Clearly the government recognizes that the relator is the *sine qua non* of a *qui tam* action and would not abandon relators' individual

claims to further its own ends. To suggest otherwise is to stretch the laws of reason.

CONCLUSION

Miller's opinion that the Court of Appeals reached the wrong decision in his case is not a reason for granting the petition. Rather, as set forth above, there are several compelling reasons why the petition should be denied. Accordingly, Rubbermaid respectfully requests the Court to deny the petition.

Respectfully submitted,

EDWARD KATZE
Counsel of Record for Respondents
Georgia Bar No. 409075
CONSTANGY, BROOKS & SMITH, LLC
230 Peachtree Street, N.W.
Suite 2400
Atlanta, Georgia 30303-1557
(404) 525-8622